Supreme Court, U.S.
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No. 95-1098

In The

Supreme Court of the United States

October Term, 1995

CARMINE CASELLA,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES AND TRANS UNION CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TRANS UNION CORPORATION

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REASONS FOR DENYING THE WRIT

A. Introduction.

This is a routine matter arising under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (the "Act"). No novel questions were involved and well-established precedent determined the outcome. Up close, the dreaded "Hobson's choice" conjured by Petitioner is a mirage. All the Act requires of the consumer is a dispute. If the agency refuses or fails properly to investigate pursuant to § 1681i, the consumer has a remedy for that violation. However, a claim respecting Respondent's reporting procedures under § 1681e(b) requires a consumer report which by definition is a *communication* of information bearing on the consumer's eligibility for credit. It is simply the way the statute is written. Thus, Petitioner's claims as to the importance of this case, and the alleged threat to Act enforcement of the opinion below are wildly exaggerated and inaccurate. Along the way, Petitioner seriously miscasts the Act's legislative history and (to put it generously) misconstrues the holdings of dispositive court opinions.

Moreover, nothing about *this* case makes a review of *Guimond, infra*, urgent or, even necessary. In fact, the result below would not be changed by the application of *Guimond*. In addition, inconsistent earlier Ninth Circuit authority casts doubt on whether a circuit split actually exists. Finally, Petitioner's ill-conceived contentions respecting the correct definition of willfulness under the Act, are meritless.

B. Statement Of The Case.

In April, 1992, Petitioner, through counsel, disputed a delinquency reported in his consumer file by the County of San Diego, California ("San Diego").[1] Respondent, Trans Union

1. Throughout, Petitioner claims that TUC's database contained (Cont'd)

Corporation ("TUC"), investigated the dispute pursuant to the Act. San Diego authorities confirmed that the information reported was accurate. TUC informed Petitioner's counsel of the results of the investigation in writing on May 18, 1992. After July, 1992, neither Petitioner nor his lawyer contacted TUC again respecting the dispute except for the lawsuit filed in June, 1993. TUC never published Petitioner's credit report containing the disputed information to any third party.

Petitioner's counsel claimed that it was difficult to convince San Diego to change its report and Petitioner suffered much distress as a result of San Diego's intransigence. However, the court of appeals properly affirmed summary judgment because the record established undeniably that (a) TUC did not cause any harm alleged by Petitioner, (b) any such harm was not caused by any alleged violation of the Act by Respondent, and (c) nothing in the record justified a finding of a willful violation of the Act permitting punitive damages. The opinions of both the District Court and the Second Circuit comport entirely with the Act's legislative history, the language of its provisions, and a long list of court decisions.

C. Legislative History And Language Of The Act.

The legislative policy of the Act is that inaccurate information in a consumer's file is no basis for suit unless the agency involved failed to comply with one of the Act's specific requirements, *e.g.*, full file disclosure, dispute investigation, maintenance of reasonable procedures to assure accuracy of

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(Cont'd)
delinquent child support obligations pertaining to him. This is patently incorrect. The file showed only San Diego County as the creditor of an account placed for collection. Nothing in the database suggested even remotely that the account involved child support or revealed anything about the nature of the alleged debt.

reported information, etc. As Senator Proxmire cogently observed:

> . . . we took something which would be less satisfactory to the consumer . . . but which would work in most cases; that is, *whenever a consumer is turned down, he then would have the right to find out what is in his credit file and to have it corrected. . . But the theory is that until they are damaged in some way by an adverse reaction . . . they do not have as much basis for correcting it. . . .*

115 Cong. Rec. at 33411 (1969) (emphasis added).

Both comments in the Congressional Record[2] and discussions at the Hearings on S. 823[3] evince a congressional

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2. "The purpose of the fair credit reporting bill is to prevent consumers from being unjustly damaged because of inaccurate or arbitrary information in a *credit report*. . . ." 115 Cong. Rec. at 33408 (1969) (statement of Sen. Proxmire) (emphasis added).

"Possible damage to that individual lies, not in the collection of the information or its dormant retention in the files, but in its *appearance in a report*." 115 Cong. Rec. at 15648 (1969) (statement of Sen. Bennett) (emphasis added).

3. "Senator Bennett: This bill would allow an individual to sue the credit bureau because *it disseminated information* supplied to it by an outside source . . ."

"Senator Proxmire: I am informed by the staffman . . . that *the consumer would not be in the position of being entitled to sue a credit bureau because it has adverse information.* All he can do is to require compliance with the law . . ." Hearings on S. 823 Before the Subcomm. On Banking and Currency, 91st Cong. 1st Session at 17 (1969) (emphasis added).

intent to make dissemination of a consumer report a prerequisite to liability.

The congressional purpose underlying the Act is that consumers not be denied credit on account of inaccurate information reported about them. In furtherance of that policy, consumer reporting agencies are obliged to disclose to consumers all information in their files pertaining to them. Consumers, in turn, may dispute information and require that non-verifiable information be deleted from their files. The statutory language fully comports with the drafters' announced intent that liability requires the transmission of information to third parties.

The Act defines a "consumer report" as follows: ". . . any . . . communication of any information bearing on a consumer's credit worthiness, . . . to be used . . . as a factor in establishing the consumer's eligibility for (1) credit. . . ." § 1681a(d). The Act defines a "file" as follows: ". . . all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored." § 1681a(g).

"Consumer report" is defined entirely by reference to transmission or communication to third parties for permissible purposes under the Act. The "file" is defined in static terms as "all of the information . . . regardless of how the information is stored" on a consumer.

These definitions are not abstract legalisms, but derive from the reality of the way consumer credit works. A consumer applies for credit. The creditor requests a consumer report to aid its decision. § 1681e(b) is triggered when the consumer reporting agency communicates creditworthiness data to the creditor. If the application is denied 15 U.S.C. § 1681m(a) requires that the creditor "advise the consumer . . . and supply the name and

address of the consumer reporting agency making the report." Absent a denial, the consumer is unaware of the report or identity of the consumer reporting agency involved. Not surprisingly, every reported case holding § 1681e(b) applicable involves a communication of a consumer report and a denial of the applied for credit, insurance, or employment. Similarly, the absence of these circumstances has resulted in dismissal of the claim.

D. Proceedings In The District Court.

The § 1681e(b)[4] claim pressed in this Court was not involved in the case in the District Court. The complaint contains six counts alleging respectively, violations of § 1681i, (*dispute reinvestigation*), (Count One); § 1681c (*obsolete information*) (Count Two); § 1681i(c) (*dispute statement*) (Count Three); § 1681g(a)(3)(A) (*disclosure requirements*) (Count Four); improper reporting to TRW (Count Five); and a state law libel claim (Count Six). The District Court's dismissal of Counts 2, 4, 5 and 6 was not appealed.

Petitioner's assertion that, "upon filing suit" TUC "immediately acknowledged" that the San Diego entry was "inaccurate" is false. (Petition, p. 9). TUC was never informed as to why San Diego modified its report, only that it did. Nothing in the record suggests much less proves that the San Diego entry was not accurate when disputed. On this point, Judge Goettel found ". . . the San Diego entry accurately reflected the claim then outstanding." (A24).

The question in the District Court was whether TUC had discharged its obligation to investigate Petitioner's dispute. In this connection, TUC's procedures were unassailable. After

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4. "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

TUC received Petitioner's April 1992 dispute, TUC promptly communicated with the San Diego authorities who confirmed the accuracy of the data previously and subsequently provided through automated tape. TUC informed petitioner's counsel of the results of the investigation in writing in May, 1992.

It is settled that, absent a dispute, TUC is entitled as a matter of law to rely upon the accuracy of information reported by public sources "because to require otherwise would be burdensome and inefficient." *Henson v. CSC Credit Services*, 29 F.3d 280, 286 (7th Cir. 1994); *Swoager v. Credit Bureau of Greater St. Petersburg*, 608 F. Supp. 972, 975 (D. Fla. 1985) and *McPhee v. Chilton Corp.*, 468 F. Supp. 494, 498 (D. Conn. 1978). Even in the face of a dispute, public record data need not be questioned unless:

> . . . the consumer has alerted the reporting agency to the possibility that the source may be unreliable or the reporting agency itself knows or should know that the source is unreliable. 29 F.3d at 287.

Here, despite the facts that Petitioner's assertion of dispute referenced a New York court order three years out of date and that there was no reason to suspect the reliability of the California source, TUC *without prompting* went beyond the data source. Indeed, Judge Goettel specifically found:[5]

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5. Petitioner's counsel requested a consumer statement, but his letter omitted crucial referenced enclosures purportedly from San Diego. Moreover, the consumer statement was entirely irrelevant to the dispute which concerned the San Diego reporting of a delinquency occurring in 1991. The consumer statement submitted concerned 1988 New York court orders, which predated the delinquency San Diego reported by more than 3 years. No consumer statement was placed in the file returned to Petitioner's counsel in July, 1992,

(Cont'd)

> We find that Trans Union's procedure is reasonable and sufficient to assure accuracy. When the delinquency item was disputed, Trans Union verified it through a different confirmatory source (inquiry to a person at the state agency itself) from the original transmission source (mass electronic data). Upon confirmation, Trans Union notified the consumer, informed him of the claim's origin, and gave him the opportunity to insert a countervailing argument into his credit report. A19.

Thus, Petitioner's claim that TUC ". . . provided no description of its reinvestigation [and that]. . . . The only source identified for the 'reinvestigation' was an entry on computer tapes automatically loaded into the Trans Union database" (Petition, p.7 n. 4) is clearly baseless. Contrary to Petitioner's claim of being kept in the dark, it was TUC which was kept in the dark by Petitioner. Petitioner's counsel treated his activities as private and never informed TUC of the outcome of his "negotiations" with San Diego.

Instantly, there was no way for TUC to know, unless advised by San Diego County or Petitioner, that San Diego's previous

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(Cont'd)
and he never protested the absence of the statement until the lawsuit was filed one year later.

This became a "non-issue"; publication to third parties is the express prerequisite to liability. There was some confusion because Judge Goettel felt that Petitioner's affidavit exceeded the 100 word limit. However, a word count proved otherwise. Judge Goettel need not have reached that question because it was admitted that no subsequent consumer report was ever issued. Moreover, TUC had no obligation to include Petitioner's patently irrelevant statement. § 1681i(c).

confirmation had been reconsidered. As noted by Judge Goettel:

> Defendants were not informed, either by plaintiff or San Diego, of the County's withdrawal in October 1992 of the delinquency item. Without notification, defendants reasonably considered the dispute resolved some five months earlier when San Diego had confirmed plaintiff's delinquency. A20.

Moreover, Petitioner overlooks the maxim that the Act does not require consumer reporting agencies to adjudicate whether an obligation reported by one court had been extinguished by another court in a different jurisdiction. In this regard, Judge Goettel properly held:

> ... defendants had no duty to investigate and resolve what in essence is a legal or bureaucratic dispute underlying a creditor claim. In this case, we cannot expect defendants to have declared San Diego's claim invalid. Expecting credit reporting agencies to independently police the validity of state claims would burden commercial dealings beyond any currently required legislative mandate. A19-20.

Notably absent from the Petition is any coherent assertion that TUC should have, or even could have, investigated the dispute differently. Petitioner's counsel in 1992 recognized that TUC could not represent his client's interests before the San Diego courts. When he was informed of the investigation and its results, counsel never urged that the matter be re-opened or expressed dissatisfaction with TUC's inquiries. Nowhere does

Petitioner challenge the central finding that TUC had fully discharged its obligation to Petitioner under the Act.

Petitioner's lamentations aside, there is no reason to speculate on the outcome of any loan application he may have been considering, but allegedly did not submit for fear of imagined consequences. The loan may have been granted, notwithstanding the San Diego information; or, it may have been refused, even if the San Diego information were not present.

The alleged constraint on Petitioner's prerogatives resulting from San Diego's recalcitrance is not harm caused by TUC or cognizable under the Act. Were it otherwise, consumer reporting agencies would be obliged to remove all disputed information, even though verified, for fear that a particular consumer may later prevail on the source of the information to change its reporting. If "accuracy" were thus judged retroactively, the effect would be to read the dispute procedures out of the Act; no agency could ever regard a dispute as "resolved", irrespective of the reasonableness of the investigation conducted.

E. Proceedings In The Court Of Appeals.

1. The Second Circuit's Correct Analysis Of The Act.

The Petition's point of departure is not the Act, but rather the affirmance of the Second Circuit that no conduct of TUC was the legal cause of any harm to Petitioner and that claims under the Act's reporting provisions could not be invoked unless there was a report which caused harm. That the Second Circuit correctly affirmed on causation grounds, does not change the accuracy of Judge Goettel's holding that TUC's investigation satisfied the requirements of the Act.

On appeal, the Second Circuit decided it was unnecessary to reach explicitly the sufficiency of TUC's investigation. The court held that no cognizable harm under the Act had been shown. This approach fully accords with those adopted by other circuit and district courts.[6]

In *Henson v. CSC Credit Services*, 29 F.3d 280, 286 (7th Cir. 1994), the Court specifically held:

> In order to state a claim under 15 U.S.C. § 1681e(b), a consumer must sufficiently allege 'that a credit reporting agency prepared a report containing inaccurate information.'

In *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1160 (11th Cir. 1991), the absence of proof that the denial of credit was caused by the alleged inaccurate information was fatal to plaintiff's § 1681e(b) claim:

> We need not reach the substance of Cahlin's FCRA claims against TRW because we find that he has utterly failed to produce any evidence tending to show that he was damaged as a result of an allegedly inaccurate TRW credit report . . . *Cahlin bears the burden of proving that a TRW credit report was a causal factor in the denial of his residential mortgage loan by First Nationwide.* (emphasis added)

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6. *See, e.g., Whelan v. Trans Union Corporation*, 862 F. Supp. 824, 832 (E.D.N.Y. 1994); *Ladner v. Equifax*, 828 F. Supp. 427, 432 (S.D. Miss. 1993).

In *Koropoulos v. Credit Bureau, Inc.*,[7] 734 F.2d 37, 42 (D.C. Cir. 1984), the court held:

> [a consumer may only bring a cause of action pursuant to § 1681e(b)] if a credit reporting agency issues an inaccurate report on the consumer, since only then does harm flow from the agency's violation.

Universally, the established essential elements of a cause of action under § 1681e(b) include proof that the agency reported inaccurate information about the plaintiff. *See Morris v. Credit Bureau of Cincinnati, Inc.*, 563 F. Supp. 962, 967 (S.D. Ohio 1983); *Whelan v. Trans Union, supra*; *Houston v. TRW Info. Services, Inc.*, 1989 WL 59850 (S.D.N.Y.) *aff'd*, 896 F.2d 543 (2d Cir. 1990); *Neptune v. Trans Union Corp.*, 1993 WL 505601 (E.D. Pa.), *aff'd*, 27 F.3d 558 (3rd Cir. 1994); *Bryant v. TRW, Inc.*, 689 F.2d 72, 78 (6th Cir. 1982); *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982).

Strangely, Petitioner contends that his view that transmission is not required is supported by *Stevenson v. TRW, Inc.*, 987 F.2d 288 (5th Cir. 1993); *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983); *Bryant v. TRW, Inc., supra*; *Thompson v. San Antonio Retail Merchants Association, supra*; *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976); and *Rasor v. Retail Credit Company*, 87 Wash. 2d 516, 554 P.2d 1041 (1976). In fact, each and every one of these cases involves a transmission of a credit report and a denial of credit. The Second Circuit's opinion below is

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7. Petitioner cites only *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984), (the companion to *Koropoulos*), where the court specially noted: "This case involves the unusual circumstance that the defendant credit reporting agency is also the credit report user. . . ." 734 F.2d at 54 n. 12. It would obviously make no sense to require that the agency disseminate to itself.

consistent with the foregoing authorities and there is no basis for further review by this Court.

2. *The Second Circuit's Correct Definition Of "Willfulness."*

Petitioner's contentions respecting "willfulness" under the Act evince a misreading of *Hazen Paper Company v. Biggins*, 113 S. Ct. 1701 (1993) and a flawed understanding of the difference between willful and negligent conduct.[8]

In *Hazen* this Court specifically rejected any definition which would "virtually obliterate any distinction between willful and non-willful violations." *Hazen, supra*, 113 S. Ct. at 1708-9. Here, the Second Circuit correctly held that a finding of willful noncompliance required a showing of "conscious disregard" or a "deliberate and purposeful action." 56 F.3d at 476. Petitioner concedes the foregoing accords with the established law and never articulates how this standard differs materially from that in *Hazen* in any event.

Petitioner's muddled discussion simply establishes no basis for this Court to review the Second Circuit's application of long-standing "willfulness" standards under the Act.[9]

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8. For example, petitioner intones: "[u]nder conventional standards for willfulness, a consumer could prevail on a showing that the credit bureau failed to take reasonable measures to investigate and to correct inaccuracies once the error was brought to its attention." (Petition, p.14). The source of such "conventional" standards is never identified. However, such circumstances were found to support only negligence and not willfulness in *Stevenson v. TRW, Inc.*, 987 F.2d 288, 297 (5th Cir. 1993).

9. *See, Stevenson, supra*; *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), *rehearing denied*, 812 F.2d 1405, *cert denied*, 107 S. Ct. 3267, 3276, 97 L. Ed. 2d 766, 780 (1987); *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1239 (E.D. Mich, 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982).

F. *Guimond* Although Wrongly Decided Would Not Change The Result Below And Is An Unreliable Indicator Of A Split In The Circuits.

While this case was pending before the Second Circuit, the Ninth Circuit decided *Guimond v. Trans Union Credit Information Co.*, 45 F.3d 1329 (9th Cir. 1995). The Ninth Circuit held that a consumer could bring a claim under § 1681e(b) based on information provided to him pursuant to the Act's mandatory file disclosure provisions. The consumer need not demonstrate a denial of credit which would have been granted had the report been free of the disputed erroneous information. Indeed, the information need not have been "reported" to any third party. In short, the materiality of the information to the consumer's eligibility for credit was held to be irrelevant.

The Ninth Circuit reached this result without any real analysis of the Act and with barely a mention of the contrary expressions of virtually every other court which had construed the Act previously, including Ninth Circuit panels. No court has followed *Guimond*. Given the opportunity, the Second Circuit wisely chose not to do so. The Second Circuit simply held that no claim based on erroneous information could be brought under the Act unless the erroneous information had been reported. The Second Circuit declined further explicit comment on *Guimond*, but like other circuits embraced the logic that claims under the Act should be judged first through the prism of whether the harm alleged was cognizable. This widely accepted approach was disallowed by the *Guimond* court without explanation.

The *Guimond* court extended § 1681e(b) to compensate a consumer for mental distress[10] arising from inaccurate but

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10. TUC has never disputed that "mental distress" may be a compensable consequence of a violation of the Act. Indeed, many courts have so held, but *only* when the elements of a violation are established. Mental distress no more proves a violation of § 1681e(b) than lost profits proves a breach of contract.

unreported information, if a jury could find it was in the file as a result of the agency's failure to maintain reasonable procedures. No other court has ever applied the § 1681e(b) standards in that way. This result is especially bizarre because the Act mandates the disclosure in the first place. In *Guimond*, the inaccuracies alleged were never claimed to be even slightly material to the plaintiff's access to credit, insurance or employment.[11] The "reasonable procedures for accuracy" component of the Act was intended to apply to matters material to eligibility contained in consumer reports, not to every conceivable bit of data in the database.

TUC believes that *Guimond* is profoundly wrong. TUC also believes that *Guimond* is irreconcilable with the opinions of the other courts, including Ninth Circuit precedent purportedly overruled *sub silentio*. Nevertheless, TUC opposes review because *Guimond* would not change the result instantly, and its status as precedent for the Ninth Circuit's view on the matter is suspect.

First, even under *Guimond*, a *prima facie* violation of the Act must be demonstrated. In *Guimond*, it was the reappearance after removal of previously disputed inaccurate information. In a nutshell, *Casella* would be decided no differently under *Guimond* because there is no proof of an underlying violation of the Act, *i.e.*, TUC conducted a proper investigation and it was entitled to consider the dispute resolved once the data had been verified. Therefore, any "conflict" with *Guimond* is irrelevant.

Second, it is not clear that the panel's decision in *Guimond* should be taken as a reliable Ninth Circuit precedent evidencing a split between it and the other circuits. Although rehearing *en*

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11. The "inaccuracies" concerned use of a pre-labeled "spouse" field to designate a joint obligor and his social security number. The other alleged error was a non-derogatory Saks account.

banc was refused, and the matter was remanded to the district court for now pending further proceedings, the panel's decision in *Guimond* is inconsistent with the conflict reconciliation opinions of the Ninth Circuit and its value as precedent is uncertain, at best.

In *Hansen v. Morgan*, 582 F.2d 1214, 1218 (9th Cir. 1978), the Court defined "consumer report" as requiring a "communication of information ... to be used ... for the purpose of establishing the consumer's eligibility for credit transactions." Seven years later, the same court specifically held that ". . . the Act is not activated until . . . information is transmitted." *Kates v. Crocker National Bank*, 776 F.2d 1396, 1397 (9th Cir. 1985).

In *Guimond*, the panel was aware of *Kates*, but never acknowledged *Hansen*. The court determined that § 1681e(b) was not "... predicated, as a matter of law, on the ... transmission of the report to third parties. . . ." 45 F.3d at p. 1333. Then, somewhat incongruously, it cited *Kates* for authority that "the legislative history of the FCRA reveals that it was crafted to protect consumers from the *transmission* of inaccurate information about them." 45 F.3d at p. 1333 (emphasis added).

The *Guimond* panel's failure to recognize the conflict between its decision and *Kates* and *Hansen* is puzzling. After all, the conflict does not arise subtly from the application of obscure legal principles. The question is whether § 1681e(b) requires transmission. *Hansen* and *Kates* answer in the affirmative; *Guimond* in the negative. Both views cannot simultaneously be correct. Such a departure from the prior decisions of earlier panels has been expressly disapproved by the Ninth Circuit opinions governing *en banc* review.

In *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992)

(*en banc*), *cert. denied,* 113 S. Ct. 1429 (1993), the Court declared that conflict resolution among circuit panels requires *en banc* review (reaffirming *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 989, 108 S. Ct. 1293, 99 L. Ed. 2d 503 (1988), and overruling *Greenhow v. Secretary of Health & Human Services*, 863 F.2d 644 (9th Cir. 1988).[12]

Compliance responsibility for the rule in *Atonio* rests with the panel involved: "[a] panel faced with such a conflict *must* call for *en banc* review." *Id.* at 1348, emphasis in original. All of the foregoing cases involved situations in which the second panel was either unaware of the prior case or misjudged its authority to resolve conflict. Neither is true as to the decision of the *Guimond* panel. There the inconsistent case is referenced but without recognition of the conflict involved. *Guimond* has been remanded for further proceedings to the District Court. One would hope that those proceedings will explicitly determine the precedential value of *Guimond*, if any, in the face of *Hansen* and *Kates*. Any such proceeding would benefit from the wisdom expressed by Circuit Judge O'Scannlain, (concurring) on the importance of acknowledging conflicts and calling for *en banc*

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12. *Greenhow* did not cite the prior *en banc* opinion in *Atonio* and the panel in *Hardesty*, 958 F.2d 910 (9th Cir. 1992), relied on the panel decision in *Greenhow* and *Atonio* went unmentioned. In addition, the conflict referenced in *Hardesty* on the merits also arose because the panel deciding the later case, *United States v. Terrovona*, 785 F.2d 767 (9th Cir. 1986), was unaware of an earlier inconsistent decision of another panel on the same issue, *United States v. Thornton*, 710 F.2d 513 (9th Cir. 1983).

The district judge in *Hardesty* seemed also unaware of *Atonio*, but held *Thornton* controlling because it was decided earlier. The panel in *Hardesty* believed that it was not necessarily bound by the earliest panel decision, but relying on *Greenhow* determined that it could apply its own judgment as to which decision had become most associated with the circuit's view.

review, *Koff v. United States*, 3 F.3d 1297, 1300 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1537 (1994):

> I believe we do ourselves little credit, and the lawyers and litigants who practice before us little good, when we ignore an irreconcilable conflict in our decisions. We must inevitably produce such conflicts. To be sure, we can paper them over easily enough. But in doing so we tolerate and, indeed, encourage, abiding uncertainties in our circuit law, undermining the predictability and uniformity of treatment for which we are bound to strive. The law of this circuit, in short, is far more likely to develop in a rational fashion when we acknowledge our mistakes and move quickly to correct them than when we contrive to disavow them.

The uncertainty as to the existence of a circuit split undermines the appropriateness of this case for review. This is particularly so because the Second Circuit's opinion is consistent with the well-reasoned and long-standing views of every other court.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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